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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 756

McGREW PAINT AND ASPHALT CO., *Petitioner,*

vs.

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

No. 757

RAILWAY PAINT CO., *Petitioner,*

vs.

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

No. 758

DEDNOX, INC., *Petitioner,*

vs.

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

No. 759

INSUL-MASTIC ROOFING & SIDING CO., *Petitioner,*

vs.

FRANCIS B. MURPHY, DIRECTOR OF LABOR.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, McGrew Paint and Asphalt Co., a corporation, Railway Paint Company, a corporation,

Dednox, Inc., a corporation, and Insul-Mastic Roofing & Siding Co., a corporation, respectfully pray for Writs of Certiorari to the Supreme Court of the State of Illinois, to review four several judgments of that Court entered against each of your Petitioners.

Judgments and Application for Writs of Certiorari.

The judgments of the Court (R. 36, 37, 38, 39) were rendered on May 16, 1944. A Petition for Rehearing was filed on June 8, 1944 (R. 40, 41, 42, 43). The Petition for Rehearing was denied on September 18, 1944 (R. 43). This Petition for the issuance of Writs of Certiorari is filed prior to the expiration of three months from September 18, 1944.

Statement of Matters Involved.

The judgment of the Court below involves the validity of Section 2(e)(5) of the Illinois Unemployment Compensation Act (Ill. Rev. Stat. 1943, Chap. 48, par. 218). The case was tried before a representative of the Director of Labor of the State of Illinois, on a stipulation of facts. The stipulation appears of Record pp. 6 to 9. In the Court below the Petitioners at all times claimed that this Section of the Illinois Unemployment Compensation Act violated Section 1 of Article 14 of the Amendments of the United States Constitution (R. 9, 29). The same contention was presented in the Supreme Court of Illinois (R. 29, 35). It was renewed in the Petition for Rehearing (R. 41). The Supreme Court of Illinois held (R. 45) that the Constitutional issues were decided adversely to Petitioners in the case of *Zehender & Factor, Inc.* v. *Murphy*, 386 Ill. 258, and that by authority of that decision the attack upon the validity of Section 2(e)(5) is rejected.

Section 2(e)(5) of the Illinois Unemployment Compen-

sation Act (Ill. Rev. Stat. 1943, Chap. 48, Par. 218) is as follows:

> "Any employing unit which together with one or more other employing units, is owned or controlled, directly or indirectly, by legally enforceable means or otherwise, by the same interests, or which owns or controls one or more employing units directly or indirectly, by legally enforceable means or otherwise, and which if treated as a single unit with such other employing units or interests or both would be an employer under paragraph (1) of this subsection."

The Facts.

There is no dispute as to the facts. The material elements in the case are that a proceeding was commenced against the four Petitioners and also against the Insul-Mastic Laboratories Inc. by the Director of Labor of the State of Illinois, for contributions under the Unemployment Compensation Act. After the Director of Labor had notified them that they were liable the stipulation here referred to was entered into. From the stipulation it appears (R. 7):

> "(2) That said corporations were, from the date of their incorporation and throughout the periods included in the Director's determinations and assessments, controlled either directly or indirectly by legally enforceable means or otherwise by one O. V. McGrew; that each of said corporations, if treated as a single employing unit together with the other corporations had in its employment a sufficient number of persons to constitute it an employer liable for the payment of contributions under Section 2(e)(1) of the Illinois Compensation Act."

and also (R. 7):

> "(3) That none of the corporations from the period of their incorporation throughout the period covered by the Director's determinations and assessments, em-

ployed in their individual corporate capacity a sufficient number of persons so as to become liable for contributions as an employer under the provisions of Section (2)(e)(1)(A) or (2)(e)(1)(B) of the Illinois Unemployment Compensation Act."

Sections 2(e)(1) A and B of the Illinois Unemployment Compensation Act is as follows:

"'Employer' means:

"(1)(A) With respect to the years 1937, 1938 and 1939, any employing unit which has or had in employment eight or more individuals on some portion of a day, but not necessarily simultaneously, and irrespective of whether the same individuals are or were employed on each such day within each of twenty or more calendar weeks, whether or not such weeks are or were consecutive, within either the current or preceding calendar year;

"(B) With respect to the year 1940 and thereafter, any employing unit which has or had in employment six or more individuals, within each of twenty or more calendar weeks (but not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week), whether or not such weeks are or were consecutive within either the current or preceding calendar year."

The Supreme Court of Illinois reversed the *nisi prius* judgment obtained against the Insul-Mastic Laboratories Inc. but sustained the four remaining judgments rendered against these Petitioners.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1926, Section 344, Title 28, U. S. C. A.

Questions Presented.

A. Is Section 2(e)(5) of the Unemployment Compensation Act of the State of Illinois, repugnant to Section 1, Article 14 of the Amendments of the Constitution of the United States, in that said Statute deprives these Petitioners of their property without due process of law and denies them the equal protection of the laws?

That provision of the Section in question under which these Petitioners were held bound provides that they are liable for the payment of contributions if the corporations are composed of employing units, which together with other employing units are owned or controlled by the same interests directly or indirectly **by legally enforceable means or otherwise.** This provision, it is submitted, is unreasonable, arbitrary, contrary to public policy and void.

It is clear from the stipulation (R. 8) *that there are at least ten other shareholders in these corporations, some owning substantial interests in these corporations, aside from O. V. McGrew, who by stipulation was stated to control them all and who owned a majority of the capital stock in each of the four Petitioners now before this Court, and a minority in the Insul-Mastic Laboratories Inc. The stipulation to the effect that O. V. McGrew controlled these corporations does not indicate whether he controlled them legally or illegally. The stipulation in substance follows the words of the Statute to the effect that O. V. McGrew's control of all these corporations was* **by legally enforceable means or otherwise.** *This phrase would cover control by illegal threats or fraudulent and unlawful methods. Such control, if not based upon legally enforceable means, must be temporary in its nature with no standard for its temporal duration. Indeed the moment after the stipulation was submitted it might well be that the control no longer existed.*

The Court below in its opinion omitted to pass on this contention. It simply stated that the validity of Section 2(e)(5) had been sustained in the case of *Zehender & Factor, Inc.* v. *Murphy,* 386 Ill. 258.

An inspection of that case discloses that there also the Court did not consider the phraseology in question but on the contrary discussed Section 2(e)(5) generally and upheld its constitutionality as a whole and in general terms.

A remarkable feature of the Court's opinion in *Zehender & Factor, Inc.* v. *Murphy,* 386 Ill. 258, was that the Court there relied on *Handy & Harmon* v. *Burnet,* 284 U. S. 136. In that case there was before this Court the problem of consolidated returns of affiliated corporations. The Federal Statute, (40 Stat. at L. 1081, Chap. 18, Par. 240(b)) provided that for the purpose of that section two or more domestic corporations shall be deemed to be affiliated if substantially all the stock of two or more corporations is owned or controlled by the same interests. It will be noted that this Statute did not contain the expression "by legally enforceable means or otherwise." The Court said, however, page 140:

> "We assume in favor of petitioner that they, through their power over Hamilton's official position and salary, their ability to dominate both corporations or by other means, were in position effectually to influence him in respect of the voting, use or disposition of the stock issued to him, and thus as a practical matter to exert a kind of control called by counsel 'actual' to distinguish it from a legally enforceable control.
>
> "The purpose of Par. 240 was, by means of consolidated returns, to require taxes to be levied according to the true net income and invested capital resulting from and employed in a single business enterprise even though it was conducted by means of more than one corporation. Subsection (b) clearly reflects the intention, by means of such returns, to secure substantial

equality as between shareholders who ultimately bear the burden. That intention is shown by the legislative history and was given effect by the regulations contemporaneously promulgated. It requires no discussion to show that such returns will not make against inequality or evasion unless the same interests are the beneficial owners in like proportions of substantially all of the stock of each of such corporations. *Alameda Invest. Co.* v. *McLaughlin* (D. C.) 28 F. (2d) 81; *Montana Mercantile Co.* v. *Rasmusson* (D. C.) 28 F. (2d) 916; *Commissioner of Internal Revenue* v. *Adolph Hirsch & Co.* (C. C. A. 2d) 30 F. (2d) 645, 646; *Commissioner of Internal Revenue* v. *City Button Works* (C. C. A. 2d) 49 F. (2d) 705. Affiliation on any other basis would not make against inequality or evasion. It would require very plain language to show that Congress intended to permit consolidated returns to depend on a basis so indefinite and uncertain as control of stock without title, beneficial ownership or legal means to enforce it. Control resting solely on acquiescence, the exigencies of business or other considerations having no binding force is not sufficient to satisfy the statute."

It is clear that while this Court construed the Federal Statute so that its phraseology would envision only legal control, nevertheless, it is also clear from this statement that any other type of control in the opinion of this Court would be indefinite, uncertain and make for inequality.

B. Is the provision as a whole repugnant to Section 1 of Article 14 of the Amendments of the Constitution of the United States?

As the Supreme Court of Illinois has pointed out in the case of *Zehender & Factor, Inc.* v. *Murphy*, 386 Ill. 258, relied upon by the Court in the instant case (R. 35), some states have sustained the validity of similar provisions.

An investigation of the statutory provisions in the various states shows that the legislatures of the majority of the

states have either repealed provisions similar to that contained in Section 2(e)(5) or have never enacted them. These decisions of those states which have supported the constitutionality of these provisions generally indicate quite clearly that there must be something more to affiliate the enterprises sought to be taxed collectively than mere control. Nothing to that effect appears in the statute and nothing to that effect appears in this record.

A similar provision has been held unconstitutional in *Independent Gasoline Co.* v. *Bureau of Unemp. Comp.*, 190 Ga. 613, 10 S. E. (2d) 58, and in *Benner-Coryell Lumber Co.* v. *Indiana Unemployment Comp. Board*, 218 Ind. 20, 29 N. E. (2d) 776.

This Court has denied certiorari in both of these cases (*Bureau of Unemp. Comp., Petitioner* v. *Independent Gasoline Co.*, 311 U. S. 707, and *Indiana Unemployment Comp. Board, Petitioner*, v. *Benner-Coryell Lumber Co.*, 312 U. S. 698).

Reasons for Allowance of Writs.

1. It is undisputed that none of the Petitioners singly is liable for the tax imposed. The only basis for their liability as a group is that they are controlled by legal means *or otherwise* by O. V. McGrew. To subject the Petitioners collectively to a tax (for which admittedly they are not liable individually) because of control by means which may be legally unenforceable is in violation of Section 1, Article 14 of the Amendments of the Constitution of the United States. That portion of the statute which provides for the taxation of a group of employing units collectively where individually none of them would be subject to taxation does not give the taxpayer the equal protection of the laws. If the control is not legally enforceable at any one time it is control at will or aquiescence which may be altered from day to day. If the control is

control by fraud or duress it is equally repugnant to the constitutional proviso and amounts to an arbitrary deprivation of property without due process of law.

2. Even were the control exercised by legally enforceable means the statute complained of is repugnant to the Constitution of the United States for the further reason that it is an arbitrary exercise of the power of taxation against the minority stockholders. It is tantamount to a taking of their property without due process of law and a denial to them of the equal protection of the laws in violation of Section 1 of the 14th Amendment.

WHEREFORE, your Petitioners respectfully pray that Writs of Certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Illinois, commanding said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings said Supreme Court of Illinois had in said causes to the end that the causes may be reviewed and determined by this Honorable Court, and that said judgments of the Supreme Court of Illinois may be reversed by this Honorable Court, and for such other relief as may be proper.

McGREW PAINT AND ASPHALT CO., a corporation;

RAILWAY PAINT COMPANY, a corporation;

DEDNOX, INC., a corporation, and

INSUL-MASTIC ROOFING & SIDING CO., a corporation,

Petitioners,

By JOSEPH G. SLOTTOW,
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